In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY, a corporation,

Petitioner,

vs.

BORAX CONSOLIDATED, LTD., a corporation, et al.,

Respondents.

Reply of Respondents Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company to Petition for Rehearing on Petition for Writ of Certiorari.

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Table of Authorities Cited

Cases

Statutes

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In our brief in opposition to the petition for a writ we corrected a large number of erroneous assertions of fact appearing in that petition. Many of these assertions are repeated in the petition for rehearing, but we shall not advert to them again. We shall confine ourselves to noting that the petition for a rehearing states no ground within Rule 33(2) of the Rules of this Court, and we shall touch principally on what has some semblance of novelty.

The present petition seeks (at p. 3) to draw a distinction between "knowledge" and "good cause to believe" as

constituting "discovery." But the District Court found not only that petitioner for years had had "good cause to believe" but also that it had actual "knowledge," and the court below concurred in this finding (see p. 5 of our brief in opposition to petition for writ of certiorari; also R. 811). On motion for new trial, the District Court disposed of petitioner's argument on exactly this basis. Petitioner merely seeks to have this Court ignore the "two court" rule.

It is thus incorrect to say that not until 1944 did petitioner acquire adequate knowledge, and it is equally incorrect to say that petitioner's assertion to this effect has not been contradicted by us (see our brief in opposition, pp. 4-8, 12, 15).

The petition also asserts (at p. 14) the existence of an "intervening reason" for granting a writ. The alleged "intervening reason" hardly comes within the provisions of Rule 33(2) respecting "intervening circumstances of substantial or controlling effect." It is utterly unlike the sort of circumstances referred to in Rule 33(2), i.e., intervening decisions or statutes, and it merely consists of a claim that petitioner has discovered certain supposed facts alleged not to have been known theretofore. Indeed, it is not claimed that the alleged "new facts" were discovered after denial by this Court of the petition for certiorari, but only that they were discovered after the decision of the court below. Moreover, the "facts" said to be newly discovered have no bearing on the case at all. Finally, the truth, as disclosed by the record, is that for over 15 years the petitioner has been publicly charging the very "facts" which it now asserts it has just discovered, namely, that

years ago respondents obtained patents on mining claims by dishonest acts. It made these public accusations, for example, in 1934 by letter to the Department of the Interior (D. Ex. U, September, 1934),* again in 1934 (R. 587, 588), in 1936 (R. 588, 591) and in 1938 (R. 672-5).

Much space is devoted in the petition for rehearing to a so-called "Little Placer" matter. Heretofore during the progress of the case, from start to finish, petitioner has placed little or no reliance on this matter, and it conceded that it claimed no damage whatever with respect to it (see our brief in opposition at p. 3).

That concession was no more than what the pleadings, evidence and the law required. It was a frank recognition of an obvious fact. The gist of the allegations of the complaint on the subject (R. 48-53) is that in 1925 certain borate deposits were discovered in Kern County, California; that some of respondents acquired patents from the government on some of these deposits; that petitioner since 1928 has sought to obtain a lease from the United States government, under the Sodium Leasing Act, on one of the deposits known as the Little Placer; that some of the respondents opposed the application and sought to obtain a patent from the government under the mineral laws; that the Department of the Interior declined to give the petitioner a prospecting permit or a lease and also declined to give respondents a patent; and that the Little Placer still belongs to the United States govern-

*Extracts from this letter appear at R. 601-603. The entire letter is full of detailed accusations but is not printed in the record since the plaintiff was excused by the court below from printing the exhibits, which were permitted to be before the court without printing (R. 824).

ment, the latter having refused either to lease or patent it to anyone.

The damage claimed in the complaint (para. 81, R. 53) is the exact sum which petitioner alleges that it had invested in developing its brine borax plant at Searles Lake in San Bernardino County, California (para. 73, R. 45). The Little Placer in Kern County is a mining deposit of ore unrelated to the Searles Lake works, and there is no allegation of damages with respect to the Little Placer.

Furthermore, if any claim to damages relative to the Little Placer ever existed, it would itself be barred by the statute of limitations. The complaint alleges that petitioner's application to the Department for a prospecting permit was denied February 9, 1929 (R. 50), and that its application for a lease was denied finally on May 3, 1933 (R. 50). What happened thereafter were merely attempts of petitioner to induce the Department to reopen and consider and an unsuccessful attempt of respondent to obtain a patent for itself. No claim of any "fraudulent concealment" relative to the Little Placer was made either in the complaint or evidence. The assertion (p. 2) that in 1944 respondents did something to prevent petitioner from obtaining a lease is quite unfounded in the record or in reality.

Finally, even if petitioner had suffered damage from failure to receive a lease on the Little Placer, it would have no claim against respondents. The decision whether the property was subject to patent under the mining laws or to lease under the leasing acts, and, if the latter, whether to grant a prospecting permit or lease or to

refuse to grant either, was vested by law in the Department of the Interior (30 *U.S.C.* Sec. 181, 182, 261, 262; *Oregon Basin Oil & Gas Company v. Work, Secretary of Interior,* 273 U.S. 660; *United States v. Wilbur,* 283 U.S. 414). The proximate cause of petitioner's failure to obtain a lease was the determination of the United States government acting through that Department. A complaint states no cause of action for damages under the Sherman Act where the damages result from acts of government officials. *American Banana Company v. United Fruit Company,* 166 Fed. 261, aff'd *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (per Holmes, J.). Recovery of damages under the Sherman Act requires "violation of a legal right," the rejection by the Department of the Interior of petitioner's application for a lease was a determination that petitioner had no legal right to a lease, and therefore no cause of action could exist here. *Keogh v. Chicago & N. W. Ry. Company,* 260 U.S. 156 (per Brandeis, J.); *Maltz v. Sax, et al.,* 134 F.2d 2 (7 Cir.), cer. den. 319 U.S. 772. The Department of the Interior has itself stated that there is no basis for assuming that, but for respondent, petitioner would have been successful in obtaining a lease. In January and February 1947 it denied still another application by petitioner for a lease, already "finally rejected" in 1933, and still another motion for a rehearing, and it rejected as unsound petitioner's contention "that it should be granted a lease as a matter of equity because a foreign borax combine was working against it from 1928 on." (See Exhibits introduced at R. 819.)

The petition asserts (p. 9) that no federal court in a civil proceeding under Title 15 U.S.C. Sec. 15 has ever

passed on the question of continuing conspiracy as related to the statute of limitations. On the contrary, it has been passed upon repeatedly, and the law is well settled (see cases cited at page 19 of our brief in opposition).

It is respectfully submitted that the petition for rehearing should be denied.

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